

From: Akkana
To: Microsoft ATR
Date: 1/27/02 9:55pm
Subject: Microsoft Settlement

I would like to add my voice to those protesting the settlement in the Microsoft case proposed by the Department of Justice. The proposed settlement is too weak, and does nothing to punish Microsoft for its past illegal behavior or to prevent it from continuing the same patterns of behavior in the future. As a temporary measure, it would be a welcome help which might help get the industry moving again while stricter measures are being considered; but by itself it will not change anything in the long run.

There's no question about Microsoft's guilt: both the district court and the appeals court found Microsoft guilty of violating sections 1 and 2 of the Sherman antitrust act. So how can we allow a settlement which levies no penalty whatsoever against the lawbreaker -- which allows Microsoft to keep the billions of dollars of profits which have come out of the pockets of consumers and of the many smaller companies which it has trampled in the course of maintaining its illegal monopoly? The proposed settlement would send a clear message that companies are free to break the law with impunity.

We've already seen how effective a weak settlement will be on modifying Microsoft's behavior. Did the agreement of July, 1994 (http://www.usdoj.gov/opa/pr/Pre_96/July94/94387.txt.html) help in ending the company's monopolistic and bullying practices? Evidently not, or they wouldn't have been found guilty in the present case. Nor has the current proposed settlement (which Microsoft claims to support) prevented them from imposing licensing and registration agreements in their most recent software products which maintain their software monopoly and keep users from trying software from other sources. Another weak settlement is an engraved invitation for more monopolistic behavior and many more court cases in the years to come.

III: Prohibited Conduct

More important, though, is what the settlement says about Microsoft's future behavior. The settlement will place no significant restrictions on Microsoft's anticompetitive behavior, and allows the company to continue to use its monopoly to lock out other software products.

The spirit of the settlement is fine. Microsoft's most egregious violations, which have had the worst effect on competition, have been its restrictions on licensees, OEMs and other customers restricting their ability to run other operating systems or software from sources other than Microsoft, and the bulk of the settlement attempts to address such issues. However, it is so specific and its scope so limited that

the current settlement by itself will not cover the modern applications and the sorts of customers which provide the bulk of Microsoft's income.

Microsoft has already shown itself willing and able to work around loopholes in the proposed settlement. Consider its current enterprise licensing scheme, announced after the publication of the proposed remedy, which offers discounts to companies which sign an agreement not to use non-Microsoft products. Does this behavior become acceptable simply because most businesses do not fall under the heading of "IAP, ICP, ISV, IHV or OEM"?

The loopholes in III J don't specify who is to make the determination as to what constitutes encryption, anti-piracy, licensing, digital rights management, etc. What is to prevent Microsoft from claiming that all of its APIs are critical to one or more of these technologies? Who has the right to overrule them?

IV: Compliance and Enforcement Procedures

Who is to enforce these rules and ensure that Microsoft doesn't continue to flout the law as it has in the past?

IV B 3: Microsoft itself has half the responsibility (one of the first two members plus half a vote as to the third member) for selecting members of the oversight committee? Isn't it unusual for convicted criminals to be allowed to select the guards who will oversee them? These committee members, moreover, will be funded by Microsoft and will work at Microsoft's headquarters? It's hard to imagine that any technical committee will end up being a tough enforcer of the law under such conditions. And why is the technical committee prohibited from disclosing the details of any complaints or proceedings, by IV D 4(e)?

Let's face it: Microsoft isn't going to change its behavior willingly, and a small number of people chosen by Microsoft, financially beholden to the company and working side by side with company employees, in secret and out of public view, is not going to change anything.

Conclusion

An immediate measure is needed. Since the settlement, Microsoft has already shipped new software which is even more flagrantly anticompetitive than their previous products, and has announced new licensing policies which flout the spirit of all of the proposed settlements. Further deliberation may be needed regarding a strong remedy which will break Microsoft's stranglehold on the market and restore competition to the software industry. If that is the case, please consider imposing temporary sanctions (perhaps akin to the proposed settlement) to send a message that Microsoft must cease its illegal activities immediately.

For the long term, though, I urge you to reject the proposed settlement as too weak and too riddled with loopholes to do any long-term good. Please consider imposing a much stronger settlement that (1) imposes punishment for Microsoft's intentional and flagrant violation of the law, and (2) imposes real and enforceable guidelines (or structural remedies) which will offer real relief to the millions of consumers and the hundreds of companies who are suffering from Microsoft's current stranglehold on the software market.

Thank you very much for your attention.

Akkana Peck
Software Engineer
549 Arleta Ave
San Jose, CA 95128
(408)297-5257
akkana@shallowsky.com